

05-865-AA-001

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

JESSICA M. BRUNELLE,

Plaintiff,

vs.

JO ANNE B. BARNHART,  
Commissioner of Social Security,

Defendant.

Civil No. 05-865-AA  
OPINION AND ORDER

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Alan Stuart Graf, P.C.  
Attorney at Law  
P.O. Box 98  
Summertown, Tennessee 38483  
Attorney for plaintiff

Karin J. Immergut  
United States Attorney  
District of Oregon  
Neil J. Evans  
1000 S.W. Third Avenue, Suite 600  
Portland, OR 97204-2902

Michael McGaughran  
Regional Chief Counsel, Region X, Seattle  
Social Security Administration  
David M. Blume  
Special Assistant United States Attorney  
Social Security Administration  
701 5th Avenue, Suite 2900 M/S 901  
Seattle, WA 98104-7075  
Attorneys for defendant

AIKEN, Judge:

Plaintiff, Jessica M. Brunelle, brings this action pursuant to the Social Security Act (the Act), 42 U.S.C. §§ 405(g), 1383(c)(3), to obtain judicial review of the Commissioner's final decision. The Commissioner denied plaintiff's claim for Disability Insurance Benefits under Title II of the Act, and Supplemental Security Income disability benefits under Title XVI. 42 U.S.C. §§ 401-33, 1381-1383f. For the reasons set forth below, the Commissioner's decision is reversed and remanded for further administrative proceedings.

#### PROCEDURAL BACKGROUND

Plaintiff filed concurrent applications for Disability Insurance Benefits and Supplemental Security Income (SSI) disability benefits on January 28, 2002. Tr. 12-27. In a decision dated November 19, 2004, the ALJ found plaintiff not disabled in a decision. Tr. 78-80, 511-514. The Appeals Council subsequently declined plaintiff's timely request for review, thus making the ALJ's decision the final Agency decision. Tr. 6-8.

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#### STATEMENT OF THE FACTS

Plaintiff, born September 2, 1974, alleges disability beginning April 20, 2001. Tr. 133, 142, 512. Plaintiff alleges disability based upon post-traumatic stress disorder (PTSD), depression, social phobia, generalized anxiety disorder, borderline personality disorder, dependent personality traits, and panic disorders. Tr. 181-183, 493. Plaintiff has attended two years of college and, as of the February 2004 hearing, was continuing her education part-time. Tr. 93, 139, 533. She has past relevant work experience as a cook, dishwasher, painter, bakery assistant, delivery driver, and cashier. Tr. 566-67. In 2003, she worked part-time as a caregiver. Tr. 532.

#### STANDARD OF REVIEW

This court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).

The court must weigh both the evidence that supports and detracts from the Commissioner's conclusions. Martinez v. Heckler, 807

F.2d 771, 772 (9th Cir. 1986).

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The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423 (d) (1) (A).

The Commissioner has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First, the Commissioner determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520 (b), 416.920 (b).

In step two, the Commissioner determines whether the claimant has a "medically severe impairment or combination of impairments." Yuckert, 482 U.S. at 140-41; 20 C.F.R. §§ 404.1520 (c), 416.920 (c). If not, the claimant is not disabled.

In step three, the Commissioner determines whether the impairment meets or equals "one of a number of listed impairments" that the Commissioner acknowledges are "so severe as

to preclude substantial gainful activity." Id.; 20 C.F.R. §§ 404.1520 (d), 416.920 (d). If so, the claimant is conclusively presumed disabled; if not, the Commissioner proceeds to step four. Yuckert, 482 U.S. at 141.

In step four, the Commissioner determines whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520 (e), 416.920 (e). If the claimant can work, she is not disabled. If she cannot perform past relevant work, the burden shifts to the Commissioner. In step, the Commissioner must establish that the claimant can perform other work. Yuckert, 482 U.S. at 141-42; 20 C.F.R. §§ 404.1520 (e) & (f), 416.920 (e) & (f). If the Commissioner meets this burden and proves that the claimant is able to perform other work which exists in the national economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

#### DISCUSSION

At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since her alleged disability onset date. Tr. 16, 26. At step two, the ALJ found that plaintiff's PTSD, borderline personality disorder with dependent traits, and history of alcohol and cannabis abuse, in reported remission, were severe impairments, while her physical impairments were found to be non-severe. Tr. 17, 26. At step three, the ALJ found that plaintiff's impairments did not meet or equal the

requirement of a listed impairment in the listings. See 20 C.F.R. pt. 404, subpt. P, app. 1; Tr. 20-21, 26.

The ALJ next determined plaintiff's residual functional capacity (RFC). The ALJ found that, physically, plaintiff could perform all exertional levels of work, Tr. 24, 26; 20 C.F.R. §§ 404.1567, 416.967. The ALJ found, however, that plaintiff was limited in interacting appropriately with supervisors and co-workers and responding to work pressures. Tr. 24, 26. Further, the ALJ found that plaintiff had a slight-to-moderate limitation in interacting appropriately with the public. Tr. 24, 26.

At step four, the ALJ found that plaintiff was not disabled because she could perform her past relevant work as a dishwasher, cook, or painter. Tr. 25, 26. At step five, the ALJ held that plaintiff was not disabled because she could perform other work as a semiconductor assembler, laundry worker, or cannery worker. Tr. 25-27.

Plaintiff disputes the ALJ's finding of "not-disabled" for the following reasons: 1) the ALJ failed to consider plaintiff's ability to sustain employment; 2) the ALJ provided insufficient reasons for rejecting a mental health assessment; 3) the ALJ failed to address medical evidence establishing the presumptive disability of plaintiff; and 4) the RFC did not reflect all of plaintiff's limitations. Each of these issues will be addressed in turn, recognizing that the Commissioner's decision must be

affirmed if it is based on proper legal standards and the findings are supported by substantial evidence in the record.

Hammock, 879 F.2d at 501.

First, plaintiff argues that the ALJ failed to consider her ability to engage in substantial gainful activity on a sustained basis; whereas proper consideration would have resulted in a finding of disability. Plaintiff relies on Gatliff v. Comm'r of Soc. Sec., 172 F.3d 690 (9th Cir. 1999), where the court held that the claimant was unable to engage in substantial gainful activity when it was undisputed that he could not maintain any single job for longer than two months. There, the court did not define how long employment must last in order to be considered "significant," though it held that a job of two month's duration is insufficient. Id. at 694. Here, however, the ALJ noted that plaintiff has held jobs for longer than two months: plaintiff held one job for nine months (and left because she wanted to end a relationship with a co-worker rather than leaving due to anxiety), and another job for eleven months. Tr. 23. To the extent an ALJ must consider whether a plaintiff is capable of substantial gainful activity *on a sustained basis*, I find the ALJ provided legally sufficient reasons for his conclusion that plaintiff is capable of substantial gainful activity. The ALJ relied upon the vocational expert's (VE) testimony and also upon the fact that plaintiff "reported a level of functioning on a

daily basis which is inconsistent with an inability to perform all types of work activity." Id. Accordingly, I find no legal error.

Second, plaintiff argues that the ALJ ignored or gave insufficient reasons for rejecting mental health assessments. An ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the medical evidence. Batson v. Comm'r of Soc. Sec., 359 F.3d 1190, 1193 (9th Cir. 2004). An ALJ may satisfy this burden by summarizing conflicting evidence and interpreting it. Morgan v. Comm'r of Soc. Sec., 169 F.3d 595, 600 (9th Cir. 1999); Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). An ALJ must, however, provide clear and convincing reasons supported by substantial evidence for rejecting uncontradicted opinions of treating or examining doctors. Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005). If another doctor contradicts such an opinion, an ALJ must give specific and legitimate reasons supported by substantial evidence to reject it. Id. An examining doctor's opinion constitutes substantial evidence, and a non-examining doctor's opinion may also constitute substantial evidence if it is consistent with other independent evidence in the record. Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001); Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002).

Plaintiff saw Dr. Caleb Burns (Burns), a state agency

consultant, for a psychological evaluation on July 6, 2004. Tr. 477. Burns administered a series of tests that showed plaintiff was suffering from moderate to severe emotional distress. Tr. 491. Burns opined that plaintiff could not complete a normal work week without interruptions. Tr. 492. Further, he stated that plaintiff was not employable in any competitive work setting for the next twelve months because she would be unable to adhere to basic requirements regarding attendance, would be distracted by coworkers, and would be unable to maintain necessary emotional stability. Tr. 492. Burns diagnosed plaintiff with generalized anxiety disorder, PTSD, and major depression (recurrent in partial remission) and a global assessment of functioning (GAF) score of 48. Tr. 493; see Schneider v. Comm'r of Soc. Sec., 223 F.3d 968, 973-74 (9th Cir. 2004) (holding that a worsening of claimant's GAF scores and additional diagnoses indicated changed circumstances rebutting a presumption of non-disability).

The ALJ stated that Burns' opinion is entitled to little weight because it is "inconsistent with the record as a whole and with the report of Dr. Brischetto who evaluated the claimant in March 2004." Tr. 24. Further, the ALJ states that Burns did not discuss the Department of Human Services record, though he may have reviewed it, and he "appeared to rely primarily on the subjective reports of the claimant in reaching his conclusion, simply stating that the information provided by the claimant "is

seen to be fairly consistent with the records provided." Id. Moreover, the ALJ analyzed and dismissed the change in plaintiff's GAF score as follows: "that score appears to be artificially low in light of the objective findings on evaluation and her reported activities of daily living." Tr. 24.

Burns' opinion contradicts that of Dr. Brischetto (Brischetto), an examining physician; therefore, the ALJ must provide specific and legitimate reasons supported by substantial evidence to reject Burns' opinion. Bayliss, 427 F.3d at 1216. Here, I find that the ALJ has provided specific and legitimate reasons supported by substantial evidence. Specifically, the ALJ found that Burns' opinion was inconsistent with plaintiff's objective medical record and her varied daily activities. Tr. 24; Bayliss, 427 F.3d at 1216-17. The ALJ has provided specific and legitimate reasons for rejecting Burns' opinion, and the ALJ's reliance on Brischetto's opinion is substantial evidence supporting his rejection of Burns' testimony.

Finally, plaintiff argues that the RFC did not reflect all of plaintiff's limitations. I agree. In his decision, the ALJ noted that plaintiff is limited by the following diagnosed mental impairments:

agoraphobia; post traumatic stress disorder (PTSD); a generalized anxiety disorder; a dysthmic disorder; rule out dysthymia; a depressive disorder, not otherwise specified; a major depressive disorder, recurrent, moderate; major depression, recurrent, in partial remission; polysubstance abuse in remission; a

borderline personality disorder; dependent personality traits; and borderline personality traits.

Tr. 17.


The ALJ, however, found only that only plaintiff's PTSD, borderline personality disorder with dependent traits, and history of alcohol and cannabis abuse, in combination, were severe. The ALJ failed to take plaintiff's other impairments into account when formulating a hypothetical RFC for the VE. Because the ALJ relied upon incomplete vocational evidence in reaching his conclusion that an individual with plaintiff's impairments could find and sustain substantial gainful employment, the court remands the ALJ's decision to the Commissioner to obtain supplemental vocational evidence as to the effect of these additional impairments upon plaintiff's ability to sustain employment. See Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004) (remand for further administrative proceedings is appropriate if enhancement of the record would be useful).

#### CONCLUSION

Because the ALJ failed to take into account plaintiff's non-severe impairments when formulating a hypothetical RFC for the VE, the decision is reversed and remanded for further administrative proceedings.

IT IS SO ORDERED.

Dated this 11 day of August 2006.

  
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Ann Aiken  
United States District Judge